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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. RAITHIELE ROBINSON, Defendant and Appellant.	B170480 (Los Angeles County Super. Ct. No. VA75292)

APPEAL from a judgment of the Superior Court of Los Angeles County. Raul A. Sahagun, Judge. Affirmed.

Rita L. Swenor, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Marc E. Turchin and Richard S. Moskowitz, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Raithiele J. Robinson was charged with one count of receiving stolen property, to wit, motorcycles, in violation of Penal Code section 496, subdivision (a). It was further alleged defendant had suffered a prior felony conviction of carjacking, in violation of Penal Code section 215, within the meaning of Penal Code sections 1170.12, subdivisions (a) through (d), and 667, subdivisions (b) through (i). Finally, it was alleged defendant had served a prior prison term within the meaning of Penal Code section 667.5, subdivision (b).

Defendant's motion to suppress evidence pursuant to Penal Code section 1538.5 was denied. A jury convicted defendant of the charged offense. Defendant waived jury trial on the prior conviction and prior prison term allegations. The trial court found the prior conviction and prior prison term allegations to be true. Probation was denied, and defendant was sentenced to five years in state prison. This timely appeal follows.

Defendant contends on appeal as follows: (1) defendant's Fourth Amendment right to be free from unreasonable search and seizure was violated and his conviction must be overturned; and (2) the prosecutor committed misconduct when he used appellant's invocation of his Fifth Amendment right to remain silent against him at trial.

THE MOTION TO SUPPRESS PURSUANT TO PENAL CODE SECTION 1538.5

It was stipulated there was no search or arrest warrant in the case. Scott Giles was working as security at the Walgreen's on Rosecrans in Norwalk just before 7:00 a.m. on January 16, 2003. Due to prior robberies at the store, Giles was assigned to do surveillance in the parking lot. Giles saw a Ryder[1] truck pull into the parking lot, make a U-turn, and then come to a stop directly behind a maintenance worker's vehicle. The

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[1] The truck driven by defendant was referred to in the record as both a "Rider" and "Ryder" truck. We will use the latter spelling in this opinion.

truck had the word Ryder printed on the sides in yellow and white. Walgreen's is open 24 hours each day, but there were few cars in the lot that morning.

Giles saw defendant get out of the truck and walk to the rear. Defendant then walked to the rear of the maintenance worker's vehicle. The two vehicles were three feet apart. Defendant tried to open the rear door of the maintenance truck with his hand. When the door would not open, defendant went to the Ryder truck and returned with a dark object in his hand. Defendant appeared to be jimmying the maintenance worker's vehicle. The door of the maintenance worker's vehicle again did not open. Defendant returned to the Ryder truck, came back to the rear door of the maintenance worker's vehicle, grabbed the lower corner of the door, and started to pull. The door did not open, and defendant returned to the Ryder truck.

Giles telephoned the Lakewood Sheriff's Department to report what he had observed to a dispatcher, including the number on the side of the truck. Giles described the driver as a male Black, in his 30's, six feet tall, and wearing dark clothing. About 15 minutes later, Giles was transported to a gas station, where he identified defendant and saw the Ryder truck.

Deputy David Fuller was on patrol in the vicinity of Rosecrans and Bellflower on January 16, 2003, just after 7:00 a.m., when he received a radio broadcast regarding a white and yellow Ryder truck. The call had originally indicated there was a "459" in progress, and then was updated to report that the vehicle was traveling eastbound on Rosecrans. There was a description of the suspect as a male Black and a license number was given. The call was updated to indicate the number was not a license number, but instead was a number on the side of the truck. Fuller saw a truck matching the description of the reported vehicle turn right onto Rosecrans and pull into a gas station up to the gas pumps. The number on the side of the truck matched the updated number given to Fuller in the radio dispatch.

Defendant started to pump gas and then took a seat in the truck. Fuller detained defendant pending a possible burglary investigation. Fuller requested identification from

defendant, but defendant said his driver's license was suspended. Defendant was placed in the back seat of Fuller's radio car without being handcuffed. Fuller went to the cab of the Ryder truck to see if there was anything related to the crime or any identification since defendant had a suspended license. In plain view, he saw a pair of pliers on the passenger side floorboard with black electrical tape around the handles. Behind the seat, Fuller found a pellet gun. He walked to the back of the truck, opened the cargo area, and saw miscellaneous tools and three motorcycles. The cargo door rolled up and had a latch, but it was not locked.

Fuller started to climb into the back of the truck to check the motorcycles. As he did so, he could hear defendant yelling at him from the patrol car. Fuller went to see what defendant was yelling about. Defendant said the motorcycles were his, and if Fuller would call defendant's girlfriend she could come down and produce the paperwork for the motorcycles. Defendant said two of the motorcycles were his friend's and one belonged to defendant. Fuller ran the vehicle identification numbers on all three motorcycles, each of which came back as reported stolen.

After hearing argument from both sides, the trial court denied the motion to suppress. The trial court indicated it did not believe the search could be upheld as an inventory search of a vehicle. The trial court instead ruled defendant was "arrestable" for driving with a suspended license and burglary, and a search of property within his custody and control was proper.

STATEMENT OF FACTS FROM TRIAL

Lucas Dawson, an employee of Yamaha Motor Corporation, parked his trailer containing three Yamaha motorcycles on the street outside of his apartment in Long Beach on January 5, 2003. Dawson had locked the three motorcycles together with a cable lock. The trailer was locked and secured to Dawson's car with a lock through the safety chains. The next morning, Dawson returned to the location where he had parked

his vehicle and trailer. Dawson's car was still there, but his trailer, containing the motorcycles, was gone. The lock that had secured the trailer had been cut straight through. Dawson immediately reported the theft to the police.

Ten days later on January 16, 2003, Giles was working security at the Walgreen's located at 9031 Rosecrans Avenue in Bellflower. Giles was sitting in his car in the parking lot, when he saw defendant drive up in a Ryder rental truck. Defendant got out of the truck and walked to the rear of the vehicle. Defendant was in the parking lot for three to five minutes before leaving the parking lot.

Fuller saw defendant at a gas station on Rosecrans in Norwalk between 7:00 and 7:30 a.m. on the morning of January 16, 2003. Fuller detained defendant and placed him in the rear seat of the radio car. Fuller opened the rear of the truck and saw three dirt bikes. As Fuller started to walk toward the bikes, he heard defendant yelling at him. Fuller returned to defendant, who told him that defendant's girlfriend could produce the paperwork for the motorcycles. Defendant said one of the motorcycles was his, and the other two belonged to a friend. Defendant said he was going riding with some friends in the desert. The vehicle identification number on one of the motorcycles was covered with a white substance. When Fuller scratched off the white substance, he saw that the vehicle identification number was very faint and it appeared as if someone had tried to grind it. Fuller was able to read the number by using a flashlight and reading a reflection of the number. All three motorcycles in the back of the truck had been reported stolen.

Deputy Daniel Castaneda responded to the gas station off of Rosecrans in Norwalk, where he saw defendant. During a pat down, Castaneda recovered a pair of knit gloves from defendant's right rear pants pocket. Castaneda saw motorcycles, tool boxes, bungee cord straps, bolt cutters, a poncho, and a welding machine in the rear portion of the truck.

Castaneda advised defendant of his *Miranda*[2] rights, which defendant said he understood and agreed to talk. Defendant said he was in Bellflower to pick up his friend Tommy, get some gas, and go motorcycle riding. When asked for additional information about Tommy, such as his address and last name, defendant would not say anything, more or less giving no response. Defendant said his girlfriend had rented the truck. The rental invoice for the truck was recovered from the glove compartment. Defendant did not answer when asked for the last name of his girlfriend. He said she lived in Stanton, but did not provide the address.

Detective Scott Hoagland went to the residence of defendant's girlfriend, Diane Eagle, on January 16, 2003, and questioned Eagle regarding a trailer on the premises. She told Hoagland a friend of defendant's had brought the trailer and three motorcycles to her residence around January 10. She told the detective that defendant was going to ride the motorcycles on the day of his arrest. Eagle had put trash into the trailer, intending to take it to the dump. Eagle had rented the Ryder truck on January 15 with the intent of using it to move.

Hoagland interviewed defendant after defendant was advised of, and waived, his constitutional rights. Defendant said a friend of his named Tommy had brought the motorcycles to his residence on January 15, 2003, so they could go riding on January 16. Defendant said he did not have Tommy's address or phone number, and he did not know Tommy's last name. Hoagland confronted defendant with the fact that his girlfriend had said the motorcycles were brought to the residence on January 10, so it did not make sense for defendant to tell the detective the motorcycles had been brought over by Tommy on January 15. Defendant said if he told Hoagland he stole the motorcycles he would be charged with grand theft and receiving stolen property, and that defendant's time was more important than any material object.

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2 *Miranda v. Arizona* (1966) 384 U.S. 436 (hereafter *Miranda*).

DISCUSSION

I

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION TO SUPPRESS EVIDENCE

Defendant first contends the trial court committed reversible error in denying his Penal Code section 1538.5 motion to suppress the evidence seized from the cargo area of the Ryder truck. Defendant argues (1) the search cannot be upheld as an inventory search, (2) there was no probable cause to arrest defendant so the search cannot be upheld on the theory it was incident to arrest, (3) if defendant was only detained the search was unlawful, and (4) assuming there was probable cause to arrest defendant, the search went beyond that which can be justified incident to an arrest.[3]

" 'The standard of appellate review of a trial court's ruling on a motion to suppress is well established. We defer to the trial court's factual findings, express or implied, where supported by substantial evidence. In determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment, we exercise our independent judgment. [Citations.]' (*People v. Glaser* (1995) 11 Cal.4th 354, 362.)" (*People v. Weaver* (2001) 26 Cal.4th 876, 924.) The issue of the remedy for violations of the search and seizure provisions of the federal or state Constitution is controlled by federal law interpreting the Fourth Amendment. (*In re Lance W*. (1985) 37 Cal.3d 873, 886-887.)

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[3] Respondent filed a brief on the search and seizure issue arguing only that defendant had no reasonable expectation of privacy in the cargo area of the trunk. This issue had not been raised in the trial court, and this court has held that the reasonable expectation of privacy issue is forfeited if not asserted by the prosecution in the trial court. (*People v. Lindsey* (1986) 182 Cal.App.3d 772, 776-777; see also *Steagald v. United States* (1981) 451 U.S. 204, 209; *People v. Henderson* (1990) 220 Cal.App.3d 1632, 1641.) Accordingly, we ordered respondent to file a supplemental brief addressing the substance of the search and seizure issue and allowed defendant an opportunity to file a responsive supplemental brief.

Defendant's argument that there was no probable cause to justify his arrest is mistaken. Probable cause existed to arrest defendant for attempted burglary of an automobile (Pen. Code, sections 664, 459) and driving with a suspended driver's license (Veh. Code, §§ 14601, 14601.1, 14601.2; see also Veh. Code, § 12500 [operating a motor vehicle without a valid license in the driver's possession].) Giles saw defendant attempt to enter a maintenance worker's vehicle three times at a Walgreen's on January 16, 2003, once using an object in an attempt to "jimmy" the door. Giles immediately contacted the sheriff's dispatch and described what he had seen and gave descriptions of the Ryder rental truck and the driver. Almost immediately thereafter, Fuller monitored a radio broadcast pertaining to a "459" in progress. Ultimately Fuller learned the truck driven by the perpetrator was in his area. He spotted the truck, which matched the descriptions of the vehicle and driver as provided by Giles. When Fuller approached defendant at the gas station and asked for identification, defendant said his license had been suspended. Both Giles and Fuller testified at the hearing on the motion to suppress.

The observations of Giles clearly support a finding that defendant was attempting to commit a vehicle burglary at the Walgreen's on January 16, 2003. Giles testified that he telephoned the sheriff's station and "advised them what I observed." An identified civilian witness who reports criminal conduct is deemed reliable and will support a finding of probable cause to arrest. (*People v. Galosco* (1978) 85 Cal.App.3d 456, 460-461.) Fuller was entitled to make an arrest in reliance on the radio call on the incident, which included a specific vehicle description, location of travel for the Ryder truck, and description of the driver. "Reliable information furnishing probable cause for an arrest does not lose its reliability when it is transmitted through official channels to arresting officers, and the latter may rely upon it when making an arrest." (*People v. Hogan* (1969) 71 Cal.2d 888, 891.) In addition, defendant's failure to produce a driver's license, coupled with his statement that his license was suspended, amply supports the trial court's finding of probable cause to arrest under a variety of misdemeanor statutes

requiring that the driver of a motor vehicle be properly licensed. (Veh. Code, §§ 12500, 14601, 14601.1, 14601.2.)

The subjective opinion of Fuller, as to his authority to search the cargo area of the truck as part of an inventory search, is irrelevant for purposes of the Fourth Amendment. An officer's subjective motive cannot be used to invalidate objectively justifiable behavior under the Fourth Amendment. (*Whren v. United States* (1996) 517 U.S. 806, 813.) The appropriate inquiry is to determine if the circumstances, viewed objectively, justify the search. (*Scott v. United States* (1978) 436 U.S. 128, 138.) Fuller's opinion regarding the valid basis for his search as an inventory search is of no constitutional moment.

The remaining issue is whether Fuller was justified in opening the rear door to the Ryder truck, which revealed the three stolen motorcycles in the cargo area. We conclude this search did not violate the Fourth Amendment.

Fuller was entitled to conduct this search without the benefit of a search warrant. "The ultimate standard set forth in the Fourth Amendment is reasonableness. In construing this command, there has been general agreement that 'except in certain carefully defined classes of cases, a search of private property without proper consent is "unreasonable" unless it has been authorized by a valid search warrant.' []*Camara v. Municipal Court*, 387 U.S. 523, 528-529 (1967). See *Coolidge v. New Hampshire*, 403 U.S. 443, 454-455 (1971). One class of cases which constitutes at least a partial exception to this general rule is automobile searches. Although vehicles are 'effects' within the meaning of the Fourth Amendment, 'for the purposes of the Fourth Amendment there is a constitutional difference between houses and cars.' *Chambers v. Maroney*, 399 U.S. 42, 52 (1970). See *Carroll v. United States*, 267 U.S. 132, 153-154 (1925)." (*Cady v. Dombrowski* (1973) 413 U.S. 433, 439-440.)

The Supreme Court has identified two bases for the exception to the warrant requirement in automobile search cases. The first basis is the mobility of automobiles, which "creates circumstances of such exigency that, as a practical necessity, rigorous

enforcement of the warrant requirement is impossible." (*South Dakota v. Opperman* (1976) 428 U.S. 364, 367; see also *Cady v. Dombrowski*, *supra*, 413 U.S. at p. 441.) The second ground for relaxed application of the warrant requirement in automobile searches is that, "[a]utomobiles, unlike homes, are subjected to pervasive and continuing governmental regulation and controls, including periodic inspection and licensing requirements. As an everyday occurrence, police stop and examine vehicles when license plates or inspection stickers have expired, or if other violations, such as exhaust fumes or excessive noise, are noted, or if headlights or other safety equipment are not in proper working order." (*South Dakota v. Opperman*, *supra*, 428 U.S. at p. 368.)

As a result of these principles, it is now settled that "[i]f probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search." (*United States v. Ross* (1982) 456 U.S. 798, 825.) The police may search an automobile and the containers within it where they have probable cause to believe contraband or evidence is contained. (*California v. Acevedo* (1991) 500 U.S. 565, 579-580.) Probable cause exists when "there is a fair probability that contraband or evidence of a crime will be found in a particular place." (*Illinois v. Gates* (1983) 462 U.S. 213, 238.)

The search by Fuller of the cargo area of the trunk was not unreasonable under the Fourth Amendment. This search was plainly one a magistrate would have been justified in ordering by issuance of a search warrant. Fuller had fresh information that shortly before his search, defendant had been involved in a burglary. From Giles's testimony, the trial court knew the report of a burglary came from a reliable citizen informant. The attempted burglary involved defendant's use of a dark object in attempting to "jimmy" the door to the maintenance worker's vehicle. Before entering the cargo area of the truck, Fuller made a plain view observation of pliers with electrical wire around the handles, consistent with a tool used in burglaries. Search of the cargo area of the truck for instruments used in the attempted burglary was supported by a fair probability that contraband or evidence of a crime would be found.

The search need not be upheld, however, solely on the basis there was probable cause to search for evidence pertaining to the reported burglary. Defendant was asked for identification by Fuller, but defendant told Fuller his driver's license had been suspended. Defendant's failure to present identification justified a search of the truck for evidence of defendant's true identity in regards to the reported burglary and recovery of any evidence that would support a misdemeanor charge against him of driving on a suspended driver's license. Under the totality of these circumstances, there was a "fair probability" (*Illinois v. Gates*, *supra*, 462 U.S. at p. 238) that evidence of the crime of attempted burglary and evidence of the crime of driving on a suspended license would be found in the cargo area of the truck. Fuller did not violate defendant's rights under the Fourth Amendment by searching the cargo area of the Ryder truck.

II

THE PROSECUTOR DID NOT COMMIT MISCONDUCT

Defendant next argues the prosecutor committed misconduct by introducing evidence in violation of his right to remain silent, as defined in *Miranda*. Defendant expands the argument by contending the prosecutor used defendant's invocation of the right to remain silent in closing argument to the jury, in violation of *Doyle v. Ohio* (1976) 426 U.S. 610. Relying on authority from the Ninth Circuit Court of Appeals (*United States v. Lorenzo* (9th Cir. 1978) 570 F.2d 294, 297-298), defendant contends he selectively invoked his privilege against self-incrimination when he did not answer some of Castaneda's questions at the scene of the arrest, while answering others. In order to assess defendant's contention, the testimony and arguments in dispute must be set forth in detail.

A. Disputed Trial Testimony

Castaneda testified that he advised defendant of his *Miranda* rights from a card containing a verbatim statement of the rights. Defendant said he understood the rights and agreed to talk about the Ryder rental truck. Castaneda asked defendant about the motorcycles, and defendant said he was going to pick up his friend Tommy in Bellflower, to go motorcycle riding. Castaneda asked who Tommy was and where he lived, but defendant was evasive. The trial court sustained an objection and the answer that defendant was evasive was stricken. Castaneda asked defendant for Tommy's last name and testified over objection that defendant would not give it to him. When asked for Tommy's address, defendant made a general statement that he would not give Castaneda that information. Defendant said he got the Ryder truck from his girlfriend. Castaneda asked who defendant's girlfriend was, but defendant would not give that information. When asked by the trial court if defendant said he would not give the information, Castaneda said that was not a verbatim answer. Instead, Castaneda testified defendant would not say anything and "[h]e more or less gave a no response." The trial court then struck Castaneda's answer that defendant would not give the information about his girlfriend. At a bench conference, defense counsel argued that it was impermissible to turn defendant's silence against him. The prosecutor argued defendant never invoked his right to remain silent. Defense counsel replied that if defendant chose not to answer a question, "he can't turn it into he refused to answer a question." The trial court ruled that defendant's response to the questions was admissible in the absence of an invocation of the right to remain silent, but that Castaneda could not editorialize as to what defendant said. The trial court noted it had sustained an objection where the officer did not testify as to what defendant had said.

Questioning then continued in open court. The prosecutor directed Castaneda to listen carefully to the question and respond as precisely as possible. The prosecutor asked if Castaneda had asked defendant for the last name of his girlfriend. Castaneda

testified defendant gave him the first name of the girlfriend but would not give him the last name. The trial court admonished Castaneda to testify to what defendant actually said, rather than Castaneda's impression of defendant's statement. The trial court ordered Castaneda's testimony that defendant would not give the girlfriend's last name stricken. The prosecutor asked if defendant responded when asked for the last name of his girlfriend. Castaneda testified defendant did not give him an answer, but moved his shoulders back and forth in his seat. Defendant also did not respond when asked for his address in Stanton.

B. Disputed Argument by the Prosecutor

During the prosecutor's opening argument to the jury, he commented that defendant did not tell Castaneda Tommy's last name, his girlfriend's last name, or where she lived. Defendant's unwillingness to provide this information was consistent with knowing the motorcycles were stolen, according to the prosecutor's argument. The prosecutor argued that if defendant did not know the motorcycles were stolen, he would have no reason not to provide his girlfriend's last name or address. No objection was made as to this argument.

The prosecutor returned to the issue in his closing argument to the jury, contending that defendant did not give Castaneda the information that any innocent person would have provided. An objection to that argument was overruled. The prosecutor further argued that in none of defendant's statements to the deputies did he disavow knowledge that the motorcycles were stolen. An objection to this argument was overruled. The prosecutor continued by arguing that none of defendant's statements included a denial of knowledge that the motorcycles were stolen. An objection was also overruled as to the latter argument.

C. Discussion

"In *Miranda*, we noted that the advent of modern custodial police interrogation brought with it an increased concern about confessions obtained by coercion. [(*Miranda v. Arizona, supra,* 384 U.S. at pp. 445-458, fn. omitted.)] Because custodial police interrogation, by its very nature, isolates and pressures the individual, we stated that '[e]ven without employing brutality, the 'third degree' or [other] specific stratagems, . . . custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals.' (*Id.* at p. 455.) We concluded that the coercion inherent in custodial interrogation blurs the line between voluntary and involuntary statements, and thus heightens the risk that an individual will not be 'accorded his privilege under the Fifth Amendment . . . not to be compelled to incriminate himself.' (*Id.* at p. 439.) Accordingly, we laid down 'concrete constitutional guidelines for law enforcement agencies and courts to follow.' (*Id.* at p. 442.) Those guidelines established that the admissibility in evidence of any statement given during custodial interrogation of a suspect would depend on whether the police provided the suspect with four warnings. These warnings (which have come to be known colloquially as '*Miranda* rights') are: a suspect 'has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.' (*Id.* at p. 479.)" (*Dickerson v. United States* (2000) 530 U.S. 428, 434-435, fn. omitted.) The *Miranda* decision announced a constitutional rule that Congress may not supersede legislatively. (*Id.* at p. 432.)

In *Doyle v. Ohio, supra,* 426 U.S. 610 (hereafter *Doyle*), the issue presented was described by the Supreme Court as follows: "The question in these consolidated cases is whether a state prosecutor may seek to impeach a defendant's exculpatory story, told for the first time at trial, by cross-examining the defendant about his failure to have told the story after receiving *Miranda* warnings at the time of his arrest. We conclude that use of

the defendant's post-arrest silence in this manner violates due process, and therefore reverse the convictions of both petitioners." (*Id*. at p. 611, fn. omitted.) *Doyle* does not support defendant's position, because defendant waived his *Miranda* rights and made statements to the deputies, whereas in *Doyle*, there was no *Miranda* waiver. Defendant therefore argues he selectively invoked his *Miranda* rights when he refused to tell Castaneda the last names and addresses of defendant's friend, Tommy, and defendant's girlfriend. He argues it was *Miranda* error to elicit answers reflecting his refusals to answer, and that it was *Doyle* error for the prosecutor to rely on defendant's silence as evidence of guilt during argument to the jury.

The standard of review on appeal in deciding whether a defendant invoked his *Miranda* rights is clear. "On appeal, a trial court's resolution of such a question is reviewed independently. (*People v. Jennings* (1988) 46 Cal.3d 963, 979.)" (*People v. Ashmus* (1991) 54 Cal.3d 932, 969.)

The issue of whether the concept of selective invocation is a valid extension of *Miranda* and *Doyle* was expressly rejected by Division Four of this District in *People v. Hurd* (1998) 62 Cal.App.4th 1084 (hereafter *Hurd*). In *Hurd*, a defendant in custody for the murder of his wife waived his rights under *Miranda*, but thereafter refused to demonstrate for the police how the shooting took place.[4] The defendant argued on appeal that his refusal to demonstrate the shooting constituted an invocation of his Fifth Amendment rights as to that specific area, and it was a denial of due process under *Doyle* for the prosecution to use that limited invocation against the defendant at trial. (*Id*. at p. 1092.)

After reviewing federal authorities on the issue of selective invocation of *Miranda* rights, the *Hurd* case rejected the concept of selective invocation of *Miranda* rights. "We take a somewhat different view. A defendant has no right to remain silent selectively. Once a defendant elects to speak after receiving a *Miranda* warning, his or her refusal to

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[4] The defendant in *Hurd* also refused to take a polygraph.

answer questions may be used for impeachment purposes absent any indication that such refusal is an invocation of *Miranda* rights. Here, appellant talked freely and voluntarily about his relationship with his wife and how the shooting occurred including drawing a diagram. By refusing the demonstration, appellant in effect said, 'I'll tell you, but I won't show you.' Appellant cannot have it both ways. Appellant was not induced by the *Miranda* warnings to remain silent. Having talked, what he said or omitted must be judged on its merits or demerits, and not on some artificial standard that only the part that helps him can be later referred to." (*People v. Hurd, supra,* 62 Cal.App.4th at pp. 1093-1094, fn. omitted.)

The California Supreme Court was confronted with the issue of selective invocation of *Miranda* rights recently in *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 119. The California Supreme Court noted the decision in *Hurd*, while recognizing that courts of other jurisdictions view the issue differently. (*People v. Coffman and Marlow, supra,* at p. 119.) The California Supreme Court did not resolve the conflict in authorities in *Coffman and Marlow,* because any error was harmless beyond a reasonable doubt. (*Id.* at p. 120.)

We need not decide whether the concept of selective invocation is a valid legal principle the United States Supreme Court would embrace. Assuming an in-custody defendant may selectively invoke his privilege against self-incrimination, we are satisfied the principle has no application in this case, because defendant's refusal to provide information did not constitute an invocation of his Fifth Amendment rights. The instant case is no different than *United States v. Lorenzo* (9th Cir. 1978) 570 F.2d 294, the primary authority upon which defendant relied in his opening brief in support of this contention. *Lorenzo* involved a charge of possession and attempting to pass counterfeit currency. During a search after Lorenzo's arrest, a Secret Service agent recovered a variety of genuine and counterfeit currency. The Secret Service agent asked Lorenzo "if he didn't think it was a little silly that he had gone to the bank to cash a hundred dollar bill" since he was in possession of approximately $300 cash and had also turned over 75

genuine $20 bills among other cash at the time he was arrested. Lorenzo "didn't reply to that," and "[t]o that comment, he made no response." The Secret Service agent then "asked him or explained to him that this appeared to be the result of passing sixteen counterfeit twenty dollar bills and explained that if a twenty dollar bill is passed, it would normally be to purchase a small item worth a dollar or two and get the maximum change. If you pass sixteen twenty dollar counterfeits, you would get back something in the neighborhood of the change contained there, the sixteen tens, the sixteen fives and the fifty-six dollars. I asked him if that didn't indicate to him that the money there was the result of passing counterfeit activities. He shrugged and mumbled something that I was not able to distinguish in response to that." (*Id*. at pp. 296-297.)

On appeal, the Ninth Circuit concluded "that the district court committed no error in allowing the challenged testimony and thus we need not concern ourselves with whether the alleged 'error' meets either the standard of reviewability or reversibility." (*United States v. Lorenzo, supra,* 570 F.2d at p. 297.) "It is also clear that a suspect may, if he chooses, selectively waive his Fifth Amendment rights by indicating that he will respond to some questions, but not to others. We recognized such a selective waiver in *Egger v. United States*, 509 F.2d 745, 747 (9th Cir.), *cert. denied*, 423 U.S. 842 (1975) (wrongful prosecutorial comment on exercise of Fifth Amendment rights was harmless beyond a reasonable doubt). [¶] The precise question here is whether Lorenzo's failure to respond to one question put by the interrogating agent constituted either a total or a selective revocation of his earlier waiver of his Fifth Amendment rights. We hold that it did not. [¶] . . . [¶] . . . Although we do not have the benefit of the trial court's ruling on this issue, we conclude from the record that in light of the willingness with which Lorenzo began to talk to the officers—and continued to do so after his failure to respond to a single question—he cannot be said to have invoked his right to remain silent. Under the circumstances, Lorenzo's failure to respond was not 'insolubly ambiguous,' *Doyle v. Ohio*, [*supra,*] 426 U.S. [at p.] 617, and it was thus not error to allow testimony as to that event." (*United States v. Lorenzo, supra,* 570 F.2d at pp. 297-298.)

The holding in *Lorenzo* that there was no *Miranda* invocation, selective or total, is consistent with numerous California authorities. In *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1239, during the course of an interrogation in a murder case following a *Miranda* waiver, the defendant in frustration said, " 'I don't know that you, *I don't want to talk about this.* You all are getting me confused. (Inaudible) I don't even know what you're all talking about. You're getting [,] you're making me nervous here telling me I done something I ain't done. Kill somebody, come on, give me a break.' " In rejecting the argument that the defendant's statement ("*I don't want to talk about this*") was an invocation of defendant's *Miranda* rights, the court surveyed a wide range of authorities rejecting similar contentions:

"There are a number of cases in which this court and the Court of Appeal have reviewed the findings of the trial court that what is claimed, post hoc, to be a suspect's attempt to invoke his *Miranda* right to remain silent and cut off further questioning is something less or other than that. (See, e.g., *People v. Davis* (1981) 29 Cal.3d 814, 823-824 [single statement by defendant during polygraph that he did not want to answer a question was not an assertion of *Miranda* rights]; *People v. Jennings* (1988) 46 Cal.3d 963, 977-978 [defendant's statement, after assailing questioning police officer, that ' "I'm not going to talk." . . . "That's it. I shut up" ' reflected 'only momentary frustration and animosity' toward one of the officers and was not an invocation of his right to remain silent]; *In re Joe R.* (1980) 27 Cal.3d 496, 516 [in context, defendant's statement, ' "That's all I got to say" ' or ' "That's all I want to tell you," ' did not amount to assertion of right to remain silent]; *People v. Silva* (1988) 45 Cal.3d 604, 629 [defendant's statement, ' "I really don't want to talk about that," ' did not amount to invocation of *Miranda*].) This is another such case." (*People v. Musselwhite*, *supra*, 17 Cal.4th at pp. 1239-1240.)

Once Castaneda obtained a waiver of defendant's Miranda rights, he was free to question defendant until defendant exercised his privilege against self-incrimination. (*People v. Silva* (1988) 45 Cal.3d 604, 629.) We are satisfied defendant's refusal to

provide additional information regarding his friend, Tommy, and his girlfriend did not amount to an invocation of the privilege against self-incrimination under the circumstances of this case. Defendant waived his *Miranda* rights without limitation. He was told he was being questioned about the Ryder truck, which contained the three stolen motorcycles. It was defendant who offered the excuse that he had the motorcycles to go riding with Tommy. It was also defendant who told Castaneda that defendant's girlfriend had rented the truck. Follow-up questions attempting to identify Tommy and defendant's girlfriend were clearly within the contemplated scope of the inquiry regarding the Ryder truck containing stolen motorcycles. Defendant's act of moving his shoulders around and not providing additional information about Tommy or defendant's girlfriend when asked to do so is indistinguishable from the shrugging and mumbling found not to constitute an invocation of rights in *United States v. Lorenzo, supra,* 570 F.2d 294. Defendant made no statement expressing an intent to invoke his privilege against self-incrimination. We conclude he did not assert his rights, selectively or entirely, by his conduct during the interrogation.

Assuming it were error of constitutional dimension to admit Castaneda's testimony regarding defendant's failure to answer questions regarding his friend and girlfriend, and further assuming the prosecutor commented improperly on defendant's silence in argument to the jury, the errors were harmless beyond a reasonable doubt. (*People v. Coffman and Marlow*, *supra*, 34 Cal.4th at p. 120.) As defendant recognizes, the only substantive issue in the case was whether or not defendant had knowledge the three motorcycles were stolen, because there was no issue that the motorcycles were stolen and that defendant was in possession of them. The unchallenged evidence on the issue of knowledge was so overwhelming that we may easily conclude the allegedly inadmissible evidence and improper argument did not contribute to the jury's verdict.

Defendant made statements to three deputies—Fuller, Castaneda, and Hoagland. There is no suggestion by defendant that his statements to Fuller and Hoagland were improperly received into evidence. As soon as Fuller opened the rear cargo area of the

Ryder truck, defendant began yelling from the patrol vehicle to such an extent that Fuller went to see what defendant was yelling about. Without any suggestion from Fuller that the motorcycles were stolen, defendant told Fuller that his girlfriend could produce the paperwork for the motorcycles. Defendant said one of the motorcycles was his, and the other two belonged to a friend. These statements were obvious lies, indicating a consciousness of guilt regarding the stolen nature of the motorcycles, since the record is undisputed that the motorcycles belonged to Yamaha Motor Corporation and had been stolen from Dawson. The truth was that defendant did not own one of the motorcycles, his friend did not own the other two motorcycles, and defendant's girlfriend had no paperwork pertaining to the motorcycles.

Defendant's statements to Hoagland served to eliminate any question as to defendant's knowledge the motorcycles were stolen. Defendant said his friend Tommy had brought the motorcycles to his residence on January 15, 2003, so they could go riding on January 16. Defendant said he did not have Tommy's address or phone number, and he did not know Tommy's last name. Tommy was never produced as a witness, nor further identified throughout the course of the trial. Hoagland confronted defendant with the fact that his girlfriend had said the motorcycles were brought to the residence on January 10, so it did not make sense for defendant to tell Hoagland the motorcycles had been brought over by Tommy on January 15. Defendant said that if he told Hoagland he stole the motorcycles, he would be charged with grand theft and receiving stolen property, and that defendant's time was more important than any material object. Implicit in this statement is defendant's recognition that he knew the motorcycles were stolen but he was not going to admit it, due to the time he would have to spend in custody if convicted of a felony.

Given defendant's conduct and statements reflecting his knowledge the property was stolen, and the absence of any credible defense, any error in admitting Castaneda's brief reference to defendant's failure to answer questions and the prosecutor's reference

to defendant's silence was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

The judgment is affirmed.

NOT TO BE PUBLISHED.

KRIEGLER, J.*

We concur:

ARMSTRONG, Acting P. J.

MOSK, J.

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* Judge of the Superior Court for the Los Angeles Judicial District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.